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New York State Public Employment Relations  
Board (PERB)

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9-23-1991

## State of New York Public Employment Relations Board Decisions from September 23, 1991

New York State Public Employment Relations Board

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## State of New York Public Employment Relations Board Decisions from September 23, 1991

### Keywords

NY, NYS, New York State, PERB, Public Employment Relations Board, board decisions, labor disputes, labor relations

### Comments

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STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

PUBLIC EMPLOYEES FEDERATION,

Charging Party,

CASE NO. U-12182

-and-

STATE OF NEW YORK (DEPARTMENT OF  
TAXATION & FINANCE),

Respondent.

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KURT MINERSAGEN, for Charging Party

BOARD DECISION AND ORDER

The Public Employees Federation (PEF) has filed exceptions to the dismissal by the Director of Public Employment Practices and Representation (Director) of its charge against the State of New York (Department of Taxation & Finance) (State).

The Director dismissed the charge, which alleges a violation of §209-a.1(d) of the Public Employees' Fair Employment Act (Act), upon his initial review pursuant to §204.2 of the Rules of Procedure. The Director concluded that PEF alleged a breach of contract not within our jurisdiction under §205.5(d) of the Act.

For the reasons which follow, we affirm the Director's decision.

The charge complains about certain unilateral changes in a "Work Week Adjustment Program" under which employees are given credit for weekends spent in travel status. The charge alleges that this program was established pursuant to negotiations

between the parties and the program is characterized in the charge as a negotiated benefit.

In its exceptions, PEF argues that the charge is within our jurisdiction because the program is not a part of the parties' collective bargaining agreement.

The jurisdictional limitation in §205.5(d) of the Act runs to a violation of an agreement between an employer and union. An agreement under the Act is simply the product of a mutual exchange of promises between the parties to a negotiating relationship.<sup>1/</sup> Section 205.5(d) of the Act provides, in relevant part, that the Board:

[S]hall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice.

The jurisdictional limitation in §205.5(d) embraces any agreement as defined without regard to form or content. A claimed breach of an oral agreement<sup>2/</sup> or an agreement ancillary to the parties' main contract<sup>3/</sup> lies as much beyond our jurisdiction as a violation of the written collective bargaining agreement. It is, therefore, immaterial to the jurisdictional inquiry that

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<sup>1/</sup>Act §201.12.

<sup>2/</sup>The Act itself in §204.3 requires a written contract only on demand.

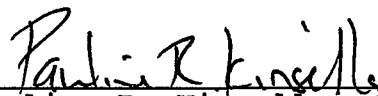
<sup>3/</sup>See Windsor Cent. School Dist., 13 PERB ¶3103 (1980) (alleged violation of grievance settlement dismissed for lack of jurisdiction). Accord County of Suffolk, 22 PERB ¶3033 (1989). See also Warsaw Cent. School Dist., 23 PERB ¶3022 (1990) (alleged breach of memorandum of understanding regarding hours of work dismissed for lack of jurisdiction).

the program in issue is not a part of the parties' main contract. As the charge pleads that the program was established under and as a result of an exchange of promises, it necessarily lies beyond our power to entertain.

For the reasons set forth above, PEF's exceptions are dismissed and the Director's decision is affirmed.

THEREFORE, IT IS ORDERED that the charge be, and it hereby is, dismissed for lack of jurisdiction.

DATED: September 23, 1991  
Albany, New York

  
\_\_\_\_\_  
Pauline R. Kinsella, Chairperson

  
\_\_\_\_\_  
Walter L. Eisenberg, Member

  
\_\_\_\_\_  
Eric J. Schmertz, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

BUFFALO TEACHERS FEDERATION,

Charging Party,  
-and-

CASE NO. U-11980

BOARD OF EDUCATION OF THE CITY SCHOOL  
DISTRICT OF THE CITY OF BUFFALO,

Respondent.

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ROBERT D. CLEARFIELD and ROBERT KLINGENSMITH, ESQS.,  
for Charging Party

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR (KARL W.  
KRISTOFF and ELENA CACAVAS of counsel), for  
Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Board of Education of the City School District of the City of Buffalo (District) and cross-exceptions filed by the Buffalo Teachers Federation (BTF) to an interim decision<sup>1/</sup> of the Director of Public Employment Practices and Representation (Director) rendered after a hearing.

As relevant to the issues before us, the Director held that the District waived its reserved right to ratify a tentative agreement, reached on September 1, 1990 between representatives of the BTF and Albert Thompson, Superintendent of Schools,

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<sup>1/</sup>With the parties' agreement, the Director heard and decided only one of the two pleaded causes of action.

because Thompson and Joseph Carney, the District's Director of Employee Relations, undermined that agreement<sup>2/</sup> during their meetings with members of the Board of Education. In remedy, the Director ordered the District to execute, upon BTF's demand, a document embodying the agreements reached in negotiations.

The District ascribes the following errors to the Director in its exceptions:

1. His denial before hearing of the District's motion to dismiss the charge for failure to state a prima facie case;
2. His denial during the hearing of the District's motion in limine<sup>3/</sup> to preclude the introduction of certain evidence by BTF;
3. His failure to rule on the District's motion to dismiss at the close of the BTF's direct case;
4. His failure to consider evidence bearing upon certain of the District's affirmative defenses;
5. His substantive findings of violation and the remedial order issued pursuant thereto.

BTF's cross-exceptions relate to the Director's remedy. BTF argues that the Board of Education's right and duty to legislatively approve certain terms of the tentative agreement pursuant to §201.12 and §204-a of the Act should also be held waived or that we should find that the necessary legislative

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<sup>2/</sup>See, e.g., City of Saratoga Springs, 20 PERB ¶13031 (1987). Reaffirming earlier decisions, we there stated that negotiators for each side have an affirmative duty to present the agreement to their ratifying entity and to support its approval.

<sup>3/</sup>A motion in limine seeks a ruling on the admissibility of evidence.

approval has already been given. Although somewhat unclear, BTF apparently seeks an order requiring the District to implement the terms of the tentative agreement on the theory that it is a binding contract in all respects.

We turn first to the several procedural errors attributed to the Director by the District.

A prehearing motion to dismiss for failure to set forth a prima facie case is properly granted only if the facts alleged cannot, as a matter of law, constitute a violation of the Act under any recognized or acceptable legal theory.<sup>4/</sup> In deciding such a motion, the charging party is entitled to all reasonable inferences and a presumption of the truth regarding the matters asserted.<sup>5/</sup> BTF alleges in its charge that members of the District's negotiating team violated their statutory duty to support ratification of the agreement and cites certain statements and actions in support of that allegation. As the allegations, if proven, could support a violation of the Act, we affirm the Director's decision to deny the District's prehearing motion to dismiss.

The Director also denied the District's motion to preclude the introduction of any evidence regarding discussions which occurred during any executive session of the Board of Education

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<sup>4/</sup>See Rules of Procedure §204.2; State of New York (Office of Mental Health), 24 PERB ¶3004 (1991).

<sup>5/</sup>City of Yonkers, 23 PERB ¶3055 (1990).



or any evidence obtained ex parte by BTF's attorneys in violation of Disciplinary Rule (DR) 7-104(A)(1) of the Code of Professional Responsibility (CPR).

The District would have us preclude the introduction of any evidence regarding any discussions about collective negotiations which occurred during an executive session of a board of education to further the public policy underlying the State's Open Meetings Law.<sup>6/</sup> The Open Meetings Law authorizes, but does not require, a public body to hold an executive session to discuss collective negotiations.<sup>7/</sup> The District argues that there is a need for robust debate during these sessions which will be threatened if the conversations are not privileged.

The State Administrative Procedure Act permits the introduction of material and relevant evidence at an adjudicatory proceeding unless a recognized privilege attaches to the evidence sought to be introduced.<sup>8/</sup> Our Rules of Procedure are to the same effect.<sup>9/</sup> There is no recognized privilege which attaches to all statements made during an executive session conducted by a

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<sup>6/</sup>N.Y. Pub. Off. Law, Art. 7, §§100-111 (McKinney 1988).

<sup>7/</sup>N.Y. Pub. Off. Law, §105(1)(e) (McKinney 1988).

<sup>8/</sup>State Admin. Proc. Act, §306 (McKinney 1984).

<sup>9/</sup>Rules, §204.7(h).

public body and the statutory authorization to hold such a session cannot create one.<sup>10/</sup>

The District also argues that the Director's denial of its motion in limine undercuts the public policy of General Municipal Law §805-a(1)(b) which prohibits a municipal officer from disclosing confidential information acquired during the course of the officer's official duties. Our preceding discussion of evidentiary privilege applies equally to this particular argument. Moreover, we are unaware of any rule of law which makes all conversations during an executive session confidential within the meaning of the General Municipal Law, and, therefore, its provisions are not applicable.

With respect to the first aspect of its motion in limine, the District argues lastly that the Director's ruling encourages

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<sup>10/</sup> In Cirale v. 80 Pine St. Corp., 35 N.Y.2d 113 (1974), the Court of Appeals recognized a common-law official information privilege which protects from disclosure certain confidential communications between or to public officers. The Court later, however, in Doolan v. BOCES, 48 N.Y.2d 341 (1980), indicated that the privilege has since been superseded by the State's Freedom of Information Law which the Court stated fixed "the public policy concerning governmental disclosure. . . ." The privilege, to whatever extent it remains viable in New York, is generally applicable only where the public interest protected outweighs the public interest which would be served by disclosure in the particular case. Fisch, New York Evidence, §741 at 438 (2d ed. 1977 & 1990-91 Supp.). We are not persuaded that the balance of competing interests favors nondisclosure of all communications during executive sessions of a public body when those communications often constitute the claimed impropriety or are the sole or major proof of the impropriety in this type of case. In view of this determination, we need not decide whether the record could support a violation if there were no consideration given to any of the statements made during the Board of Education's executive sessions.

unions to file nonmeritorious charges only to ascertain the employer's "bottom line" for negotiations. In rejecting this argument, we need note only that it is not the circumstance in this particular case. We consider the District's suggestion to be, at most, a remote possibility which can be adequately addressed under our existing rules without having to adopt the broad exclusionary rule advocated by the District.

As noted, the second aspect of the District's motion in limine involves DR 7-104(A)(1) of the CPR. The CPR is essentially the legal profession's self-government document, embodying principles of ethical conduct for attorneys as well as rules for professional discipline. DR 7-104(A)(1) prohibits an attorney from communicating directly with a party known to have counsel in a matter unless the attorney has the prior consent of the party's counsel or is authorized by law to communicate with the party.

The District alleges in support of this aspect of its motion that counsel for BTF twice talked with Judith Fisher, President of the District's Board of Education, who later was subpoenaed by BTF and testified as a witness on its behalf.

We do not consider it our right or responsibility to enforce the CPR in the context of our proceedings. To ensure consistency in approach, enforcement of an attorney's ethical responsibilities is best left to the professional bodies and the judicial system charged with that specific duty. Moreover, were we to undertake

any responsibility for the enforcement of an attorney's professional ethics, the disposition of the statutory issues which are exclusively or properly within our jurisdiction would be delayed, a result we consider to be plainly inconsistent with the specific policies of the Act and administrative adjudication in general. Our approach to this issue is particularly appropriate when, as here, the alleged violation of the disciplinary rule is unrelated to the credibility of the witness or the trustworthiness of other evidence.

Although the District relies upon the Court of Appeals' recent decision in Niesig v. Team 1 (Niesig),<sup>11/</sup> that decision does not require or warrant a change in our approach to the enforcement of ethical standards of professional practice. Niesig did not involve an attempt to use the disciplinary rule as the basis for an evidentiary privilege. In Niesig, plaintiff's attorney in a personal injury case sought the courts' permission to interview privately a corporate defendant's employees who had witnessed the accident in issue. The question presented, therefore, was whether the interview was prohibited and the Court was careful to specifically limit its decision to that particular issue under the facts of that case.<sup>12/</sup> With that admonition in mind, and given our other concerns, we are unwilling to use Niesig

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<sup>11/</sup>76 N.Y.2d 363 (1990).

<sup>12/</sup>76 N.Y.2d at 376.

as the basis for the creation of an exclusionary rule for application in the context of administrative adjudication.

For these reasons, we affirm the Director's ruling denying the District's motion in limine in its entirety. We do not, therefore, make any findings as to whether DR 7-104(A)(1) was violated by BTF's counsel on the facts in this record.

The District's motion to dismiss at the close of BTF's direct case was necessarily denied by the Director, albeit without a specific ruling, and we consider the District's exception in that context.

The disposition of this particular motion is governed by standards similar to those which apply to prehearing motions to dismiss for failure to set forth a prima facie case.<sup>13/</sup> Having reviewed the record on BTF's direct case, we cannot conclude that the evidence, read in the light most favorable to BTF, is plainly insufficient to establish any violation of the Act. Therefore, the District's motion in this respect was properly denied by the Director.

The District also argues that the Director's decision during the hearing to reserve decision on its motion to dismiss at the close of BTF's direct case constituted a procedural error which affected the outcome of the case.

The Director's decision to reserve decision on the motion was a matter for his discretion. We find no abuse in the exercise of

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<sup>13/</sup> See, e.g., County of Nassau, 17 PERB ¶3013 (1984).

this discretion which reflected the Director's recognition of the limited circumstances which we have said will justify the granting of such a dispositive motion.

The District next argues that the Director refused to permit it to introduce evidence regarding certain of the District's affirmative defenses which centered upon allegations that the BTF had made strike threats before the ratification vote and had submitted nonmandatory subjects of bargaining to impasse.

Preliminarily, we note that there is a wealth of evidence in the record regarding BTF's strike threats, so much that any additional evidence in that respect might well be regarded as unduly repetitious.<sup>14/</sup> We dismiss that part of this exception for that reason alone. Moreover, we agree with the Director's observation that evidence which is otherwise properly excluded does not necessarily become admissible just because it bears upon an affirmative defense. Neither the BTF's alleged strike threats nor its alleged refusal to bargain would have permitted the District's negotiators to violate their independent duty to support the tentative agreement.<sup>15/</sup> As the Director's decision to either minimize or exclude evidence related to the District's affirmative defenses was not reversible error, we also dismiss this exception.

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<sup>14/</sup>Such evidence is properly excluded. N.Y. Admin. Proc. Act, §306 (McKinney 1984).

<sup>15/</sup>See, e.g., Bath Cent. School Dist., 23 PERB ¶3026 (1990); City of Schenectady, 21 PERB ¶3022 (1988).

The District's next exceptions relate to the Director's substantive findings regarding the propriety of Thompson's and Carney's statements and conduct concerning ratification of the tentative agreement.

The Director held that Thompson violated his duty as a negotiator of the tentative contract when he "allowed, participated and substantively contributed to a discussion about possible alternative negotiating positions" before the Board of Education had decided whether to accept or reject the tentative agreement.

We are not persuaded, however, that Thompson's statements or actions at the September 26 executive session of the Board of Education show that he did not fully and affirmatively support the tentative agreement, and his conduct at other times is not suspect. All of Thompson's statements at that particular meeting were made in response to specific inquiries from members of the Board of Education and were in the form of possible alternatives to the tentative contract if the Board of Education were to reject the tentative contract. Unlike the Director, we do not consider Thompson's answers to the Board of Education members' questions and a discussion of options under a suggested hypothesis to have been inconsistent with his affirmative support for the tentative agreement he negotiated. For these reasons, we reverse that part of the Director's decision which finds Thompson's statements or conduct on September 26 to have been improper and grant such of

the District's exceptions as are directed to that part of the Director's decision.

The Director also held that Carney failed to carry out his duties as a negotiator by preparing and distributing to Board of Education members David Kelly and Frank Jager a four-page writing which articulated a rationale in opposition to the tentative contract and in favor of a one-year contract. The Director concluded that this writing was both intended to undermine support for the tentative contract and likely caused that result.

We have scrutinized the record with respect to the Director's findings in this respect and, having done so, we conclude that the record fully supports his findings regarding the propriety of Carney's conduct, which rest substantially upon the Director's assessment of Carney's credibility drawn from his observations of Carney's demeanor as a witness.<sup>16/</sup>

Turning to BTF's exceptions as we understand them, BTF seeks an order which would require the District to implement the tentative agreement on a theory that any right or duty of the Board of Education under §201.12 and §204-a.1 of the Act to approve certain terms of that tentative agreement has been waived.

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<sup>16/</sup>We have generally accorded great weight to credibility determinations made by the trier of fact. See, e.g., Monticello Cent. School Dist., 22 PERB ¶3002 (1989).



BTF's arguments in support of this exception fail to make the necessary distinction between ratification and legislative approval and ignore our jurisdictional limitations. There is no statutory right or duty to ratify a tentative collective bargaining agreement. The right to ratify stems from the negotiators' reservation of that right as a condition precedent to the statutory duty to execute the contract on demand. Here, therefore, the right to ratify did not belong to the District's Board of Education. The right to ratify, having been created by the negotiators, can be waived by the negotiators' conduct if it falls below the minimum we have mandated. If the negotiators' conduct is improper, they lose any right to have the third party ratify their actions and the negotiators' duty to execute the agreement they have reached becomes fixed upon tender of a document which accurately embodies the parties' agreements reached during negotiations.

The right and duty of a legislative body of a public employer to approve legislatively certain terms of an agreement arises by statute and exists independently from any action by the negotiators, who represent the executive branch of government within which the right and duty to bargain is lodged. Unlike ratification, however, legislative approval is required only for certain terms of an agreement. Moreover, legislative approval is a right that belongs to the legislative body, not to the negotiators.

With these distinctions in mind, it should be apparent that any remedial order, other than the one entered by the Director, would necessarily require the specific performance of the terms of what BTF considers to be a binding contract. We are not empowered to grant such an order under §205.5(d) of the Act. Whether the Board of Education can and did waive its right and duty to legislatively approve certain terms of the tentative agreement or whether it preapproved that tentative agreement are not issues for our determination in the context of an improper practice charge because those issues are only relevant to the enforceability of the September 1 agreements.<sup>17/</sup> For purposes of the issues raised in this case, the District satisfies the entirety of its statutory obligation by signing a document embodying the terms of the September 1 tentative agreements.

BTF relies upon our decision in Sylvan-Verona Beach.<sup>18/</sup> In Sylvan-Verona Beach, we ordered only the execution of a contract in circumstances in which members of the legislative body served as the negotiators for the contract. Sylvan-Verona Beach merely stands for the proposition that legislative disapproval is not a viable defense to a charge alleging a refusal to execute a document embodying the agreements reached during

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<sup>17/</sup> See Watkins Glen Cent. School Dist., 23 PERB ¶13035 (1990).

<sup>18/</sup> 15 PERB ¶13067 (1982).

negotiations.<sup>19/</sup> Thus, nothing we said in that case is contrary to our determination that the issues BTF raises in conjunction with the legislative approval of the tentative contract are not within our jurisdiction.<sup>20/</sup>

For the reasons set forth above, we dismiss the District's and BTF's exceptions and we affirm the Director's decision,<sup>21/</sup> except insofar as the decision and exceptions concern the impropriety of Thompson's conduct and statements at the meeting of the Board of Education on September 26, 1990, in which respect the Director's decision is reversed and the District's exceptions are granted.

THEREFORE, IT IS ORDERED<sup>22/</sup> that the District execute, upon BTF's demand, a document embodying the agreements reached by the parties on September 1, 1990, and that it sign and post the

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<sup>19/</sup>Accord Watkins Glen Cent. School Dist., supra note 17.

<sup>20/</sup>Accord Harpursville Cent. School Dist., 14 PERB ¶3003 (1980).

<sup>21/</sup>The Director held that the District violated both §209-a.1(a) and (d) of the Act. The District has not filed exceptions directed specifically to the Director's finding that its conduct violated subparagraph (a) and, therefore, we do not reach that issue. By our affirmance of the Director's decision, however, we make no holding that a negotiator's failure to support a tentative contract constitutes a violation of §209-a.1(a) of the Act. That particular issue is simply not before us.

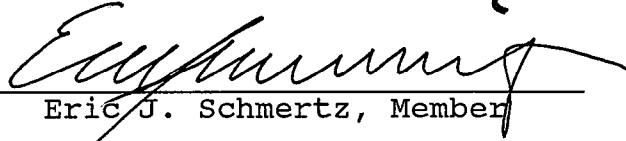
<sup>22/</sup>The District excepts to the remedial relief ordered by the Director, but does so only on the ground that his finding of a violation of the Act is erroneous. Having affirmed the Director's finding of a violation, we also adopt his recommended remedial order.

attached notice at all locations ordinarily used to post notices of information to employees in BTF's unit.

DATED: September 23, 1991  
Albany, New York

  
\_\_\_\_\_  
Pauline R. Kinsella, Chairperson

  
\_\_\_\_\_  
Walter L. Eisenberg, Member

  
\_\_\_\_\_  
Eric J. Schmertz, Member

APPENDIX

# NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE DECISION AND ORDER OF THE

## NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

### NEW YORK STATE PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees in the unit represented by the Buffalo Teachers Federation (BTF) that the City School District of the City of Buffalo:

Will execute, upon BTF's request, a document embodying the agreements reached by the parties on September 1, 1990.

THE CITY SCHOOL DISTRICT  
OF THE CITY OF BUFFALO

Dated .....

By .....  
(Representative) (Title)

*This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.*

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

PUBLIC EMPLOYEES FEDERATION, AFL-CIO,

Charging Party,

- and -

Case No. U-11728

STATE OF NEW YORK (OFFICE OF MENTAL  
HEALTH),

Respondent.

---

JOHN RYAN, for Charging Party

WALTER J. PELLEGRINI, ESQ. (RICHARD W. McDOWELL of counsel),  
for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Public Employees Federation, AFL-CIO (PEF) to a decision by the Director of Public Employment Practices and Representation (Director). The Director dismissed PEF's charge against the State of New York (Office of Mental Health) (OMH or State) which alleges that the State violated §209-a.1(a), (b) and (c) of the Public Employees' Fair Employment Act (Act) when it laid off, among others in the administrative analyst title series, PEF officers, activists and members in retaliation for PEF's public opposition to an earlier layoff plan proposed by OMH's Commissioner.

The Director dismissed PEF's charge on findings that the State's decisions were properly motivated by budgetary and other business considerations.

PEF alleges in its exceptions that the Director's summary of the facts was inaccurate in certain respects, but otherwise, it simply realleges that the State selected the administrative analyst title series for layoffs in order to reach the PEF officers, members and activists.

The State argues in response that the Director's decision was accurate in all material respects and was correct in its conclusion.

Budget reductions at OMH required a staffing reduction of 84 positions from OMH's central office. The layoffs affected the entire central office, including commissioners, provisional and temporary employees, and permanent employees, including 21 employees in PEF's unit, 13 of whom were in the administrative analyst series. Four of the administrative analysts who were laid off were PEF activists, but the record shows that only one of them was known to OMH's administrative staff to be a PEF activist.

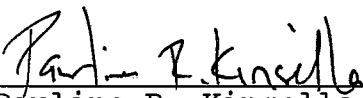
Although four persons in the administrative analyst series, who were not PEF officers or activists, were not laid off, we do not consider that fact to be dispositive in PEF's favor. As the Director noted in his decision, the scope of the layoffs affected many more employees than just PEF members, officers or activists. Whatever minor inaccuracies may exist in the Director's summary

of the material facts do not affect his decision. Having reviewed the record, we are not presented with any reason to disagree with the Director's credibility findings that OMH selected the administrative analyst title series and laid off or retained persons within that title series without regard to any individual or organizational exercise of rights protected by the Act.<sup>1/</sup>

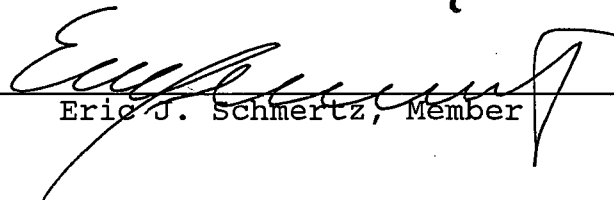
For the reasons set forth above, we deny PEF's exceptions and affirm the Director's decision.

THEREFORE, IT IS ORDERED that the charge be, and it hereby is, dismissed.

DATED: September 23, 1991  
Albany, New York

  
\_\_\_\_\_  
Pauline R. Kinsella, Chairperson

  
\_\_\_\_\_  
Walter L. Eisenberg, Member

  
\_\_\_\_\_  
Eric J. Schmertz, Member

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<sup>1/</sup>We do not decide whether the layoff of any particular individual complied with all other requirements of the Civil Service Law.



STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

JOHN THOMAS McANDREW,

Charging Party,

-and-

CASE NOS. U-11360  
& U-11362

CITY SCHOOL DISTRICT OF THE CITY OF  
PORT JERVIS and PORT JERVIS TEACHERS  
ASSOCIATION,

Respondents.

---

JOHN THOMAS McANDREW, pro se

HENRY J. HOLLEY, ESQ., for Respondent City School  
District of the City of Port Jervis

KENNETH WILDER, for Respondent Port Jervis Teachers  
Association

BOARD DECISION AND ORDER

These cases come to us on the exceptions of John Thomas McAndrew to an Administrative Law Judge's (ALJ) decision denying any remedial relief despite her finding that the City School District of the City of Port Jervis (District) and the Port Jervis Teachers Association (Association) violated, respectively, §209-a.1(a) and §209-a.2(a) of the Public Employees' Fair Employment Act (Act). The violations were premised upon the

District's and the Association's agreement to Article XVIII.(B)<sup>1/</sup> in their 1989-92 labor contract which restricted unit employees' rights to file and prosecute certain improper practice charges. The ALJ did not order any remedial relief because the District and the Association rescinded the clause shortly after the charges were filed without having previously applied it to McAndrew or other unit employees.

McAndrew requests reimbursement for the costs and legal expenses he incurred in prosecuting his charges and that the District and Association be ordered to post an appropriate notice. The District and Association urge us to affirm the ALJ's declination to order any remedial relief.

An order requiring the respondents to pay any of the expenses McAndrew incurred in the prosecution of his improper practice charges, if any, is not warranted because there are not

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<sup>1/</sup>The provision reads as follows:

ARTICLE XVIII. LEGAL LEAVES OF ABSENCE

B. When the proceeding is initiated by a member of the Port Jervis Teachers Association and is a [sic] improper practice, arbitration, or other labor related hearing any subpoena to a member of the Port Jervis Staff, shall be by court order or order of the hearing officer, after notice of application for the same and a hearing on the propriety thereof in order not to interfere with the attendance of staff to their regular duties and obligations.

any unusual circumstances present which might justify such an order.<sup>2/</sup> It is the Board's policy, however, to order a posting of notice in all cases in which a violation of the Act has been found unless there is contrary good cause shown.<sup>3/</sup> The purpose of the posting requirement is to help ensure that all unit employees have knowledge of their rights and others' obligations. We believe that a limited posting<sup>4/</sup> is appropriate in this case because despite the subsequent rescission of Article XVIII(B), we are not assured on this record that all unit employees know that the clause is not in effect.

For the reasons set forth above, we grant the exceptions which pertain to the notice posting, modify the ALJ's decision to that extent, and order both the District and Association to each sign and post notice in the form attached wherever either ordinarily posts informational notices to unit employees. In all

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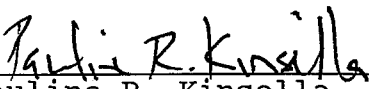
<sup>2/</sup>United Federation of Teachers, Local 2, 16 PERB ¶3052 (1983) (costs); Westbury Teachers Ass'n, 14 PERB ¶3063 (1981) (attorneys' fees).

<sup>3/</sup>See, e.g., City University of New York, 23 PERB ¶3011 (1990).

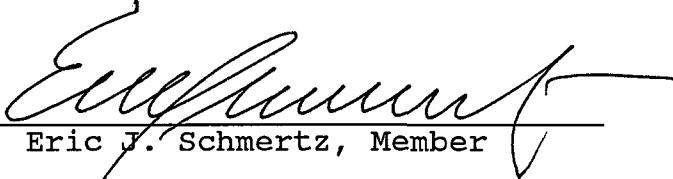
<sup>4/</sup>A notice stating that the respondents will not interfere with, restrain or coerce unit employees in the exercise of their rights under the Act is neither necessary nor appropriate under the circumstances of these cases.

other respects, the exceptions are dismissed and the ALJ's order is affirmed.

DATED: September 23, 1991  
Albany, New York

  
\_\_\_\_\_  
Pauline R. Kinsella, Chairperson

  
\_\_\_\_\_  
Walter L. Eisenberg, Member

  
\_\_\_\_\_  
Eric J. Schmertz, Member

APPENDIX

# NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE DECISION AND ORDER OF THE

NEW YORK STATE  
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE  
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the City School District of the City of Port Jervis (District) in the unit represented by the Port Jervis Teachers Association (Association), pursuant to a finding by the Public Employment Relations Board that the District violated §209-a.1(a) of the Public Employees' Fair Employment Act and that the Association violated §209-a.2(a) of the Act, that Article XVIII.(B) of the 1989-92 contract between the District and the Association has been rescinded.

CITY SCHOOL DISTRICT OF  
THE CITY OF PORT JERVIS

Dated \_\_\_\_\_

By \_\_\_\_\_  
(Representative) (Title)

.....PORT JERVIS TEACHERS ASSN.....

Dated .....

By .....  
(Representative) (Title)

*This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.*

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

AMALGAMATED TRANSIT UNION, LOCAL 1056,  
AFL-CIO,

Charging Party,

- and -

CASE NO. U-10810

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

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GLADSTEIN, REIF & MEGINNISS (WALTER M. MEGINNISS, JR.  
of counsel), for Charging Party

ALBERT C. COSENZA, ESQ. (GEORGE S. GRUPSMITH of  
counsel), for Respondent

BOARD DECISION AND ORDER ON MOTION

By motion dated August 9, 1991, the New York City Transit Authority (Authority) requests that we reconsider or clarify our decision and order in this case dated July 10, 1991.<sup>1/</sup> The request for reconsideration is based upon the alleged untimeliness of the charge and the alleged burdens placed upon the Authority under our order regarding the identification of unit employees who may be eligible for remedial relief. The identification of the specific employees who may be covered by the remedial order is also the basis for the clarification request.

The motion is opposed by the Amalgamated Transit Union, Local 1056, AFL-CIO.

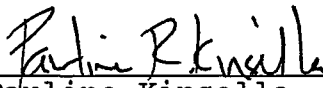
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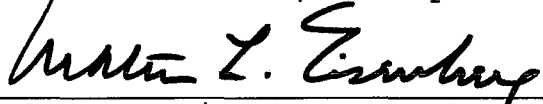
<sup>1/</sup>24 PERB ¶3013 (1991).

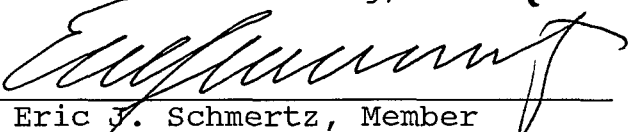
The Authority has appealed our July 10, 1991 decision and order pursuant to CPLR Article 78 and Civil Service Law §213. Our decision is sufficiently clear and should the order be enforced on appeal, any questions associated with the remedy can be addressed in the context of a compliance review. The few circumstances which favor the grant of motions similar to the Authority's are not present in this case.<sup>2/</sup>

THEREFORE, IT IS ORDERED that the motion be, and it hereby is, denied in its entirety.

DATED: September 23, 1991  
Albany, New York

  
Pauline Kinsella, Chairperson

  
Walter L. Eisenberg, Member

  
Eric J. Schmertz, Member

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<sup>2/</sup>See Town of Brookhaven, 19 PERB ¶3010 (1986); City of Auburn, 10 PERB ¶3060 (1977); Binghamton Fire Fighters, Local 729, 9 PERB ¶3078 (1976).

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

HERKIMER COUNTY COMMUNITY COLLEGE  
FACULTY ASSOCIATION,

Petitioner,

-and-

CASE NO. C-3811

HERKIMER COUNTY COMMUNITY COLLEGE and  
HERKIMER COUNTY,

Joint Employer,

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CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the Herkimer County Community College Faculty Association has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All full-time teaching and nonteaching faculty, Technical Assistants, Public Relations Coordinator, Coordinator of Radio/TV, Play and Learn Center (Assistant Director), Director of Business Assistance, Director of Credit Free Programs, Financial Aid Technical Assistant, and Learning Center Specialist.

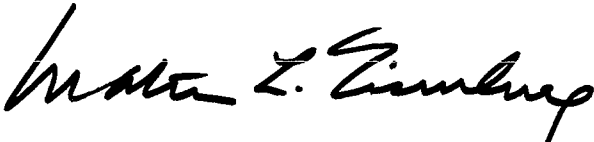



Excluded: President, Dean of the College, Dean of Students, Dean of Administration, Division Chairpersons, Director of Admissions, Director of Community Education, Director of Personnel, Assistant to the President, Director of Institutional Research, Director of Financial Aid, Director of Athletics, Controller, Director of Library Services, Bursar, Purchasing Agent, Director of Physical Plant, Facilities Program Coordinator, Systems Administrator, Director of Learning Center, Accountant and Assistant Director of Admissions.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Herkimer County Community College Faculty Association. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: September 23, 1991  
Albany, New York

  
Pauline R. Kinsella, Chairperson

  
Walter L. Eisenberg, Member

  
Eric J. Schmertz, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

FRANKLIN COUNTY DEPUTY SHERIFF'S  
ASSOCIATION,

Petitioner,

-and-

CASE NO. C-3847

COUNTY OF FRANKLIN and FRANKLIN COUNTY  
SHERIFF,

Joint Employer.

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CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the Franklin County Deputy Sheriff's Association has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

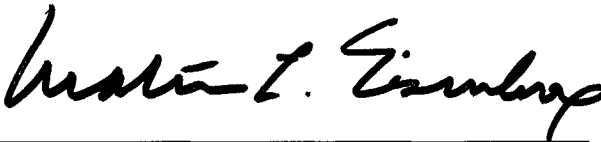
Unit: Included: Sheriff's Department employees,

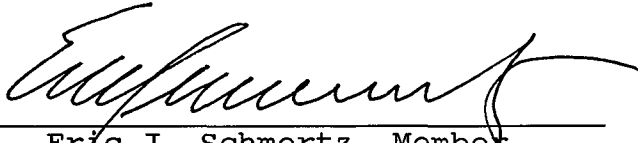
Excluded: Sheriff and Undersheriff.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Franklin County Deputy Sheriff's Association. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: September 23, 1991  
Albany, New York

  
Pauline R. Kinsella, Chairperson

  
Walter L. Eisenberg, Member

  
Eric J. Schmertz, Member